UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JONATHAN WENDER,

Plaintiff,

v.

SNOHOMISH COUNTY, et al,

Defendants.

C07-197Z

ORDER

THIS MATTER comes before the Court on plaintiff's motions to dismiss certain counterclaims and on plaintiff's motion to add two parties, namely Assistant Chief Charles Peter Caw and former Assistant Chief Michael Mitchell, both of the Mountlake Terrace Police Department. Having considered all papers filed in support of and in opposition to each motion, the Court hereby ORDERS:

(1) Plaintiff's motion to dismiss defendant Steven Rider's affirmative defense and counterclaim under RCW 4.24.510, docket no. 21, is GRANTED;

(2) Plaintiff's motion to dismiss defendant Steven Rider's counterclaim under RCW 4.24.350, docket no. 20, is DENIED; and

(3) Plaintiff's motion for leave to amend, docket no. 39, is GRANTED. Plaintiff shall electronically file his amended complaint within twenty (20) days of this Order.

Background

Pursuant to 42 U.S.C. § 1983, plaintiff Jonathan Wender sues Snohomish County, the Snohomish County Prosecuting Attorney, Snohomish County Deputy Prosecuting Attorney ("DPA") Mark Roe, the City of Mountlake Terrace, the Mountlake Terrace Police Department, the Mountlake Terrace Police Chief, the City of Lynnwood, and Lynnwood Police Commander Steven Rider, in connection with plaintiff's termination from the Mountlake Terrace Police Department, where he worked for 15 years and where he was a sergeant from April 2001 until October 2005. The underlying facts, as alleged in the various pleadings, are as follows. On June 9, 2005, while working as a sergeant for the Mountlake Terrace Police Department, plaintiff fielded a call from Natasha Jasper. Complaint ¶ 3.41 (docket no. 1); Answer ¶ 21 (docket no. 15). Ms. Jasper complained about a marijuana plant she saw outside her estranged husband's house when she went there to collect her daughter after a parental visit. *Id.* She indicated that the then pending parenting plan specifically prohibited controlled substances at the residence. *Id.* In response, plaintiff contacted Chad Jasper via telephone and, according to plaintiff, advised him to comply with the law. Complaint ¶ 3.43; Answer ¶ 22. Defendants City of Lynnwood and Commander Rider allege that plaintiff "euphemistically told [Mr. Jasper] to 'rethink his outdoor landscaping,' clearly conveying to Mr. Jasper that he should destroy evidence of his crime by getting rid of the marijuana plant." Answer ¶ 22.

On June 10, 2005, based on additional evidence obtained by Ms. Jasper, members of the South Snohomish County Narcotics Task Force ("Task Force") executed a search warrant of the residence at issue, discovered a "marijuana grow" operation, and arrested Chad Jasper. Complaint ¶¶ 3.45-3.47; Answer ¶¶ 21, 24. On June 14, 2005, Commander Rider, who led the Task Force, after consulting with Snohomish County DPA John Adcock, prepared a memorandum to Lynnwood Police Chief Jensen and Deputy Chief Ivers, in which he recommended a criminal investigation of the incident. Complaint ¶¶ 3.48-3.49; Answer ¶¶

25-26; *see also* Exh. A to Miller Decl. (docket no. 27). Based on procedures that plaintiff asserts were unconstitutional, but which did not directly involve Commander Rider and which are therefore not at issue in these motions, plaintiff's employment with the Mountlake Terrace Police Department was subsequently terminated.

Plaintiff has alleged against Commander Rider two causes of action under 42 U.S.C. § 1983, namely retaliation for the exercise of free speech and deprivation of liberty and property without due process of law. Complaint ¶¶ 4.1-4.2. Commander Rider has asserted an affirmative defense and counterclaim pursuant to RCW 4.24.510, as well as a counterclaim pursuant to RCW 4.24.350. Answer at 6-8 (Fourth Affirmative Defense, Counterclaim ¶¶ 1-2). Plaintiff now moves to dismiss the affirmative defense and counterclaims on grounds of federal preemption and violation of the First Amendment. Pursuant to Fed. R. Civ. P. 5.1, the Washington State Attorney General was notified of the constitutional challenge, and has declined to intervene. Letter from Maureen Hart, Solicitor General (docket no. 35).

Plaintiff also moves to add as defendants the current and a former Assistant Chief of the Mountlake Terrace Police Department. Defendants City of Mountlake Terrace and Police Chief Scott Smith object, but no other defendant has filed a response.

Discussion

A. Anti-SLAPP Law

The Washington legislature has observed that strategic lawsuits against public participation (or "SLAPP" suits) are "filed against individuals or organizations on a substantive issue of some public interest or social significance," and "are designed to intimidate the exercise of First Amendment rights." Laws of 2002, ch. 232, § 1. To protect advocacy to government, the legislature adopted an anti-SLAPP law, which is codified at RCW 4.24.510. The statute provides, in part:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability

> for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510. The anti-SLAPP law further states:

> A person *prevailing upon the defense provided for in this section* is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars.

Id. (emphasis added).

Plaintiff asserts that RCW 4.24.510 is preempted by federal law, namely 42 U.S.C. §§ 1983 & 1988. Commander Rider appears to concede that the anti-SLAPP law is preempted by federal statute to the extent that it seeks to immunize a state actor from liability for violation of constitutional rights. *See* Rider Response at 4 (docket no. 30). Commander Rider also appears to withdraw his counterclaim. *See id.* at 2 ("Commander Rider is not bringing a counterclaim under RCW 4.24.510."). Commander Rider, however, asserts that RCW 4.24.510 would provide him remedies in addition to those available under § 1988 in the event he prevails against plaintiff's § 1983 claim, primarily $10,000 in statutory damages. Commander Rider's argument ignores the express language of the anti-SLAPP statute, which requires that a person seeking to recover fees, expenses, and statutory damages prevail "upon the defense provided for in this section." RCW 4.24.510. Because the "defense provided for" in RCW 4.24.510 cannot be asserted by a person acting "under color" of state law in subjecting a person to the "deprivation of any rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983, the remedies outlined in the statute are likewise unavailable. *See Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.*, 448 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006) (holding that California's anti-SLAPP statute did not "apply to federal question claims in federal court because such application would frustrate substantive federal rights" (citing *In re Bah*, 321 B.R. 41, 46 (9th Cir. 2005))). The Court therefore grants plaintiff's motion to dismiss the affirmative defense and counterclaim asserted under RCW 4.24.510.

B. Malicious Prosecution Statute

With respect to the constitutionality of RCW 4.24.350, the parties have identified a split of authority, with the Western District of Washington concluding that the statute passes rational basis review, and the Eastern District of Washington declaring that the law unconstitutionally discriminates on the basis of viewpoint. *Bakay v. Yarnes*, 2005 WL 2454168 (W.D. Wash., Bryan, J.); *De La O v. Arnold-Williams*, 2006 WL 2781278 (E.D. Wash., Shea, J.). The parties also discuss a Ninth Circuit case, which held a California penal statute unconstitutional based on impermissible viewpoint discrimination, but the decision is distinguishable and therefore of little assistance. *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005), *cert. denied*, -- U.S. --, 126 S. Ct. 2023, 164 L. Ed. 2d 780 (2006). *Chaker* concerned a California statute that defined as a misdemeanor the filing of "any allegation of misconduct against any peace officer . . . knowing the allegation to be false." 428 F.3d at 1221 (quoting Cal. Penal Code § 148.6). The Ninth Circuit held that, although California could have outlawed knowingly false speech made in connection with the peace officer complaint process, the State could not prohibit only knowingly false allegations of misconduct, as opposed to knowingly false praise or assertions of valor. *Id.* at 1225-29. *Chaker* is distinguishable on at least two grounds: (i) *Chaker* concerned a substantive criminal code, as opposed to a procedural civil statute; and (ii) *Chaker* involved a proscription on specific types of statements, as opposed to a remedy available to specific types of individuals. Thus, the Court does not view *Chaker* as binding authority for purposes of this case.

Under Washington law, the elements of malicious prosecution are as follows: (1) the defendant instituted or continued an action; (2) probable cause for the action was absent; (3) the proceedings were instituted or continued through malice; (4) the proceedings were terminated on the merits in favor of the plaintiff; (5) the plaintiff suffered injury or damage as a result of the action; (6) an arrest or seizure of property occurred; and (7) the plaintiff suffered special injury of a nature that would not necessarily result from similar actions.

Clark v. Baines, 150 Wn.2d 905, 911-12, 84 P.3d 245, 248-49 (2004); *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d 956, 603 P.2d 828 (1979) (holding that enactment in 1977 of RCW 4.24.350 did not alter the common law elements of malicious prosecution). In 1984, the Washington legislature amended RCW 4.24.350 to eliminate the arrest or seizure and the special damages elements of malicious prosecution and to allow liquidated damages in the amount of $1,000, as well as reasonable attorney's fees, for actions brought by judicial officers, prosecuting attorneys, and law enforcement officers.[1] *See* RCW 4.24.350(2).

Plaintiff argues that the statute impermissibly discriminates in favor of law enforcement officers, prosecuting attorneys, and judges, relying substantially on Judge Shea's opinion in *De La O*. The Court does not find the *De La O* decision persuasive. The *De La O* opinion relies on the faulty premise that "civil lawsuits are a form of expression." 2006 WL 2781278 at *3. The Supreme Court, however, has consistently held that baseless litigation, motivated by an unlawful purpose, falls outside the First Amendment's protections. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition." (citations omitted)). In evaluating the constitutionality of RCW 4.24.350(2), the applicable provision of the First Amendment is the right to petition clause, as opposed to the freedom of speech clause. Jurisprudence regarding freedom of expression indicates that the government may proscribe certain types of content, *e.g.*, fighting words, defamation, obscenity, but it may not prohibit such unprotected content based on the view taken. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-85 (1992). In other words, the government may proscribe libel, but it may not censor "*only* libel critical of

[1] The suit must also arise out of "the performance or purported performance of the public duty of such officer." RCW 4.24.350(2). The parties do not appear to dispute that Commander Rider's counterclaim for malicious prosecution relates to actions he took while performing his official duties.

the government." *Id.* at 384 (emphasis in original). As Commander Rider aptly observes, however, RCW 4.24.350 does not proscribe speech, but rather the act of maliciously filing a frivolous lawsuit. The First Amendment provides no immunity from liability for bringing baseless claims. *See McDonald v. Smith*, 472 U.S. 479, 485 (1985) ("The right to petition is guaranteed; the right to commit libel with impunity is not."). Moreover, RCW 4.24.350 does not target a particular viewpoint; an action can be meritless and motivated by malice regardless of whether it criticizes or applauds the person sued.

Judge Bryan's opinion in *Bakay* contains analysis more consistent with the relevant authorities. Judge Bryan began with the observation that a person has no fundamental right to bring an action that is "objectively baseless and subjectively motivated by an unlawful purpose." 2005 WL 2454168 at *6. Judge Bryan further noted that police officers, prosecutors, and judges are not a suspect classification. *Id.* at *7. Judge Bryan therefore concluded that the constitutional challenge to RCW 4.24.350 should be evaluated under rational basis review,[2] and he found that the special treatment afforded under the statute to judges, prosecutors, and police officers bore a rational relationship to their unique role in our

[2] The Court does not agree with plaintiff that Judge Bryan applied rational basis review to only an equal protection challenge. Judge Bryan described the plaintiff in *Bakay* as alleging that RCW 4.24.350(2) has a "chilling effect on free speech." 2005 WL 2454168 at *4. Judge Bryan, however, rejected the notion that a fundamental right of expression was implicated, and therefore used rational basis review, rather than strict scrutiny, to assess the First Amendment claim. *Id.* at *6.

society.[3] *Id.* at *6-*8. The Court adopts this logic and likewise rejects the constitutional attack on RCW 4.24.350.[4]

Plaintiff also contends that RCW 4.24.350 is preempted by 42 U.S.C. § 1983. Under 42 U.S.C. § 1988, the party prevailing in an action brought under 42 U.S.C. § 1983 may recover reasonable attorney's fees; however, if the defendant prevails, the defendant may be awarded such fees only if the plaintiff's action was "frivolous, unreasonable, or without foundation." *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006). Subjective bad faith on the part of the plaintiff is not a prerequisite to a defendant's award of fees under §§ 1983 and 1988. *Price v. Hawaii*, 789 F. Supp. 330, 334 (D. Haw. 1992). Plaintiff asserts that § 1988 precludes any additional damages under a state statute, citing *Haynes v. City of Gunnison*, 214 F. Supp. 2d 1119 (D. Colo. 2002). *Haynes*, however, does not support plaintiff's position. In *Haynes*, the defendants sought attorney's fees under a Colorado statute that applied only to claims made pursuant to state law. *Id.* at 1120. The Court in *Haynes* concluded that the fees requested were for overlapping work done on both state claims and § 1983 claims, that defendants did not meet the standards of § 1988, and

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[3] In addition, judges, prosecutors, and police officers, as a class, are generally unable to demonstrate arrest or seizure in connection with frivolous claims, and therefore, the different standard of RCW 4.24.350(2) bears a rational relationship to a legitimate governmental purpose, namely making possible claims or counterclaims of malicious prosecution for such class of individuals. *See* Laws of 1984, ch. 133, § 1 ("The legislature finds that a growing number of unfounded lawsuits, claims, and liens are filed against law enforcement officers, prosecuting authorities, and judges, and against their property, having the purpose and effect of deterring those officers in the exercise of their discretion and inhibiting the performance of their public duties.").

[4] Magistrate Judge Arnold has also concluded that RCW 4.24.350 "does not concern itself with the content" of the malicious action, and it therefore passes constitutional muster. Order at 3-4 (docket no. 53), *Johnson v. City of Sequim*, Case No. C00-5354-JKA (W.D. Wash. Mar. 12, 2001), *aff'd in part and rev'd in part on other grounds sub nom. Johnson v. Hawe*, 388 F.3d 676 (9th Cir. 2004), *cert. denied*, 544 U.S. 1048 (2005). The Court notes that counsel for plaintiff in this matter was also involved in the case before Magistrate Judge Arnold, but did not alert the Court to the prior opinion on the merits.

that defendants therefore failed to show entitlement to an award of fees. *Id.* at 1121-23. The *Haynes* Court did not conclude that the state statute was in any respect preempted by federal law.

Contrary to plaintiff's contention, RCW 4.24.350 is not inconsistent or in conflict with § 1983 or § 1988. Section 1988 contemplates an award of fees to a defendant against a § 1983 plaintiff who has brought a frivolous claim. RCW 4.24.350 requires a much higher showing, namely malice. As recognized by the Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the legislative intent underlying § 1988 was to permit a defendant to recover attorney's fees even when the plaintiff was not motivated by bad faith. *Id.* at 419. If Congress had meant otherwise, no statutory provision would have been required because "under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith." *Id.* Thus, in allowing liquidated damages, as well as attorney's fees, for suits based on malice and defended on the merits, RCW 4.24.350 is not contrary to, but rather consonant with, the purposes of § 1988. The Court therefore denies plaintiff's motion to dismiss the counterclaim asserted under RCW 4.24.350.

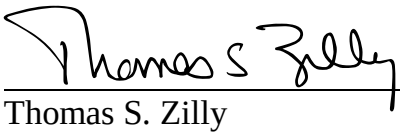
C. Motion to Amend Complaint

Plaintiff seeks to add as defendants both the current and former Assistant Chiefs of the Mountlake Terrace Police Department. Defendants City of Mountlake Terrace and Police Chief Scott Smith object on grounds of futility and prejudice. Defendants assert that the current and former Assistant Chiefs had no authority to terminate plaintiff's employment or place plaintiff on administrative leave, and that both individuals had a right to free expression concerning their views of plaintiff's conduct. Plaintiff counters that authority to terminate is not a prerequisite to liability under § 1983, and that the current and former Assistant Chiefs had supervisory control over plaintiff. The futility argument prematurely seeks adjudication on the merits of plaintiff's claim, and the Court declines to rule at this

time on whether plaintiff has a viable claim against either the current or the former Assistant Chief. As to the issue of prejudice, defendants point to the delay of eight months in adding the current and former Assistant Chiefs, but they do not assert unnecessary expense from depositions or other discovery now rendered useless or the like, the loss of witnesses, or other indicia of prejudice. Therefore, the Court grants plaintiff's motion for leave to amend. Fed. R. Civ. P. 15(a) ("leave [to amend] shall be freely given when justice so requires"). The amended complaint shall be electronically filed within twenty (20) days of this Order.

IT IS SO ORDERED.

DATED this 24th day of October, 2007.



Thomas S. Zilly
United States District Judge